

CHAPTER 21

REGULATORY PROGRAM - PROTECTION OF THE PUBLIC INTEREST IN THE WATERS OF THE UNITED STATES

21-1. Background.

a. Regulatory Approach of the Corps of Engineers.

(1) The U.S. Army Corps of Engineers has been involved in regulating certain activities in the Nation's waters since 1890. Until 1968, the primary thrust of the Corps' regulatory program was to protect navigation. As a result of new laws and judicial decisions, the Corps' 1968 permit regulations required for the first time a full public interest review involving a balancing of the favorable impacts against the detrimental impacts as the primary basis of permit decisions.

(2) Most of the authority for administering the regulatory program has been given to the 36 district commanders and 8 division commanders. There is no administrative appeal of a district or division commander's decision, except as provided for Federal agencies under agreements pursuant to Section 404(q) of the Clean Water Act (CWA).

(3) The Corps seeks to avoid unnecessary regulatory controls. The general permit program is the primary method of reducing the intensity of Federal regulation of minor activities.

(4) Applicants are not necessarily due a favorable decision but they are due a timely one. Reducing unnecessary paperwork and delays is a continuing Corps goal.

(5) State and Federal regulatory programs should complement rather than duplicate one another. Use of general permits, joint processing procedures, interagency review coordination and authority transfers (where authorized by law) is encouraged to reduce duplications.

b. Types of Activities Regulated.

(1) Dams and dikes in navigable waters of the United States;

(2) Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States;

(3) Activities that alter or modify the course, condition, location, or physical capacity of a navigable water of the United States;

(4) Construction of fixed structures, artificial islands, and other devices on the outer continental shelf;

(5) Discharges of dredged or fill material into the waters of the United States, including incidental discharges associated with mechanized land clearing, channelization, dredging and other excavation activities;

(6) The transportation of dredged material for the purpose of dumping it in ocean waters.

21-2. Authorities to Issue Permits.

a. Section 7 of the River and Harbor Act approved 8 August 1917 authorizes the Secretary of the Army to promulgate regulations for the use, administration, and navigation of the navigable waters of the United States as public necessity may require for the protection of life and property or for operations of the United States in providing channel improvements. Procedures followed for promulgation of such regulations, although they do not involve issuance of permits, are similar to those for the permit program. (33 CFR Part 324)

(1) Danger Zones. Regulations can be prescribed for the use and navigation of any area likely to be endangered by Department of Defense (DoD) operations. The authority to prescribe danger zone regulations is exercised so as not to interfere with or restrict unreasonably the commercial fishing industry. (33 CFR Part 324)

(2) Restricted Areas. When required for the protection of life and property at DoD installations, certain areas maybe set aside and reserved, such as naval restricted areas. Reasonable regulations may be prescribed, after public notice, restricting or prohibiting the use of such areas by vessels. The Coast Guard is authorized to establish restricted areas for safety but not restricted areas for DoD facilities. (33 CFR Part 324)

b. Section 9 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 401) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that state, if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army. Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966.

c. Section 10 of the River and Harbor Act of 1899 prohibits the unauthorized obstruction or alteration of any navigable water of the United States. This section provides that the construction of any structure in or over any navigable water of the United States, or the accomplishment of any other work affecting the course, location, condition, or physical capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The Secretary's approval authority has since been delegated to the Chief of Engineers.

d. Section 13 of the River and Harbor Act of 1899 (33 U.S.C. 407) provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency (EPA), and the states under Sections 402 and 405 of the CWA, respectively.

e. Section 404 of the CWA authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for discharges of dredged or fill materials into the waters of the United

States, provided that such discharges are found to be in compliance with the guidelines published by EPA to implement Section 404(b)(1) of the CWA. Section 404(c) of the CWA authorizes the Administrator of EPA to prohibit or restrict the use of a disposal site whenever he determines that the discharge of such materials will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

f. Section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA) of 1972, as amended, authorizes the Secretary of the Army to issue permits for the transportation of dredged material for ocean disposal when the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological system, or economic potentialities. The selection of disposal sites will be in accordance with criteria developed by the Administrator of EPA in consultation with the Secretary of the Army. The Administrator can prevent the issuance of a permit if he finds that the dumping of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries or recreational areas.

21-3. General Policies for Evaluating Permit Applications. The following policies are applicable to the review of all applications for Department of the Army permits.

a. Public Interest Review.

(1) The decision whether to issue a permit is based on an evaluation of the probable impacts (including cumulative impacts) of the proposed activity on the public interest. Evaluation of the probable impacts which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each specific case. The benefits which may reasonably accrue from the proposal must be balanced against its reasonably foreseeable detrimental impacts. The decision whether to authorize a proposed activity, and if authorized, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general public interest balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered, as must their cumulative effects. Considered are: conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted if issuance is found to be contrary to the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(a) The relative public and private need for the proposed structure or work;

(b) Where there are unresolved conflicts respecting resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work;

(c) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work may have on public and private uses to which the area is suited.

b. Effect on Wetlands.

(1) Some wetlands are vital areas that constitute a productive and valuable public resource. The unnecessary alteration or destruction of those areas should be discouraged as contrary to the public interest.

(2) Wetlands considered to perform functions important to the public interest are listed in Chapter 20, paragraph 20-3.

(3) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the wetland site to which a particular application relates will be evaluated with the recognition that it is part of a complete and interrelated wetland area.

(4) No permit will be granted which involves the alteration of wetlands identified as important unless the district commander concludes, based on the public interest review, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits. In evaluating whether a particular alteration is necessary, the district commander shall consider whether the proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment or whether practicable alternative sites are available. The applicant must provide sufficient information on the need to locate the proposed activity in the wetland and must provide data to evaluate the availability of practicable alternative sites.

(5) The congressional policy expressed in the Estuary Protection Act, Public Law 90-454, and state regulatory laws or programs for classification and protection of wetlands will also be given great weight.

c. Fish and Wildlife. In accordance with the Fish and Wildlife Coordination Act, the Corps of Engineers will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which the work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct or indirect loss and damage due to the activity proposed in a permit application. The district commander will give full consideration to these views in evaluating the application.

d. Water Quality. Applications for permits for activities which may affect water quality will be evaluated for compliance with applicable effluent limitations, water quality standards, and best management practices. Certification by the state under provisions of Section 401 of the CWA will be considered conclusive with respect to water quality considerations unless the Regional Administrator, EPA, advises of other water quality aspects to be taken into consideration. Any permit issued may be conditioned to implement water quality protection measures.

e. Historic, Cultural, Scenic, and Recreational Values. Application for permits may involve areas which possess recognized

historic, cultural, scenic, conservation, recreational, or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect the proposed structure or activity may have on values such as those associated with wild and scenic rivers, registered historic places and natural landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under Federal or state law for similar and related functions.

f. Interference with Adjacent Properties or Water Resource Projects. Authorization of work or structures by the Department of the Army does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) Because a landowner has the general right to protect his or her property from erosion, application to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, adversely affect public health and safety, adversely impact flood plain or wetland values, or otherwise appear not to be in the public interest, the district commander will so advise the applicant and inform him or her of possible alternative methods of protecting his or her property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of Government resources.

(2) A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.

(3) Where it is found that the work for which a permit is desired is in navigable waters of the United States and may interfere with an authorized Federal project, the applicant should be apprised in writing of the fact and of the possibility that a Federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction.

(4) Proposed activities which are in the area of a Federal project which exists or is under construction will be evaluated to insure that they are compatible with the purposes of the project.

g. Activities Affecting Coastal Zones. Applications for Department of the Army permits for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-Federal applicant until certification has been provided that the proposed activity complies with the Coastal Zone Management Program, and the appropriate state agency has concurred with the certification or has waived its right to do so. However, a permit may be issued to a non-Federal applicant if the Secretary of Commerce, on his or her own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act or is otherwise necessary in the interest of National security. Federal agency and Indian tribe applicants for Department of the Army permits are responsible for complying with the

Coastal Zone Management Act's directives for assuring that their activities which directly affect the coastal zone are consistent, to the maximum extent practicable, with approved state coastal zone management programs.

h. Activities in Marine Sanctuaries. Applications for permits in a marine sanctuary established by the Secretary of Commerce will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of the MPRSA of 1972, as amended, and implementing regulations.

i. Other Federal, State, or Local Requirements.

(1) Processing of an application for a Department of the Army permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the Department of the Army permit will normally not be delayed pending action by other Federal, state or local agencies. Where a required Federal, state or local permit or certification has been denied before final action on the Army permit, a Corps permit will be denied without prejudice. The applicant can reinstate processing of his or her application if subsequent approval is received from the Federal, state or local agency originally denying authorization.

(2) Where officially adopted Federal, state, regional, local or tribal land-use classifications, determinations or policies are applicable to areas under consideration, they shall be presumed to reflect local factors of the public interest and shall be considered in addition to the other National factors of the public interest.

(3) A proposed activity may result in conflicting comments from several agencies within the same state. The district commander will elicit from the governor an expression of his or her view concerning the application or an expression as to which state agency represents the official state position.

(4) In the absence of overriding National interest factors, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals and requirements expressed in applicable statutes and 33 CFR 320-330 have been followed and considered. Similarly, a permit will generally be issued for Federal and Federally-authorized activities; another Federal agency's determination to proceed is entitled to substantial consideration in the Corps public interest review.

(5) The district commanders are encouraged to develop joint procedures with those states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. In such cases, applications for Department of the Army permits may be processed jointly with the state or with the other Federal entities, but with conclusion and decision by the district commander independent of the Federal or state agency determinations. Alternatively, the Corps may issue a general permit to eliminate regulatory duplication.

j. Safety of Impoundment Structures. To insure that all impoundment structures are designed for safety, non-Federal applicants may be required to demonstrate that the structure has been designed by qualified persons or independently reviewed (and modified as the review would indicate) by similarly qualified persons. (See 33 CFR

325).

k. Flood Plain Management. Although a particular alteration to a flood plain may constitute a minor change, the cumulative impact of such changes often results in a degradation of flood plain values and functions and results in increased potential for harm to upstream and downstream activities. In accordance with the requirements of Executive Order (EO) 11988, district commanders, as part of their public interest review, will consider alternatives that will avoid to the extent possible the long and short term adverse impacts associated with the occupancy and modification of flood plains.

l. Water Supply and Conservation. Full consideration will be given to water conservation as a factor in the public interest review, including opportunities to reduce demand and improve efficiency in order to minimize new supply requirements. This policy is subject to Congressional policy stated in 101(g) of the CWA--that the authority of states to allocate water quantities shall not be superseded, abrogated or otherwise impaired.

m. Energy Conservation and Development. District commanders will give great weight to energy needs as a factor in the public interest review and will give high priority to permit actions involving energy projects.

n. Navigation. Navigation in all navigable waters of the United States continues to be a primary concern of the Federal Government and will be given great weight in the public interest balancing process.

21-4. Jurisdictional Limits:

a. The River and Harbor Act of 1899. With respect to this Act ("Navigable Waters of the United States"):

(1) Rivers and Lakes. Federal regulatory jurisdiction extends laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. (33 CFR 329.11(a)) At some point along its length, a navigable waterbody will change its character and lose its real or potential physical ability to support commerce. That upper limit point where the waterbody ceases to be a navigable water of the United States is usually termed the "head of navigation". (33 CFR 329.11(b))

(2) Ocean and Tidal Waters. The Corps regulatory jurisdiction includes all ocean and coastal waters generally within a zone three nautical miles seaward from the coast line. For bays and estuaries, jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. This includes marshlands and similar areas insofar as those areas are subject to inundation by the mean high tidal waters. The base line (ordinary low tide line) from which the territorial sea is measured is specified in the Convention on the Territorial Sea and the Contiguous Zone. (15 UST 1606; TIAS 5639; 33 CFR 329.12)

b. The Clean Water Act of 1977. With respect to this Act ("waters of the United States") jurisdiction is more extensive than under the River and Harbor Act of 1899. (33 CFR 328)

c. Marine Protection, Research and Sanctuaries Act of 1972.

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This Act defines a regulatory jurisdiction with respect to "Ocean Waters." (33 CFR 324.2)